UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9385/February 15, 2013

SECURITIES EXCHANGE ACT OF 1934
Release No. 68943/February 15, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15211

In the Matter of GREGG C. LORENZO, FRANCIS V. LORENZO, and CHARLES VISTA, LLC, **Respondents.**	Administrative Proceeding File No. 3-15211

RESPONDENTS GREGG C. LORENZO AND CHARLES VISTA, LLC's PRE-HEARING BRIEF

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Preliminary Statement

Respondents, Gregg C. Lorenzo ("Lorenzo") and Charles Vista, LLC ("Charles Vista")(collectively, "Respondents") by their counsel Gusrae Kaplan Nusbaum PLLC, submit this Pre-Hearing Brief in opposition to the allegations against them in the U.S. Securities and Exchange Commission's ("SEC") Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, and Sections 15(b), 21(B) and 21(C) of the Securities Exchange Act of 1934 (the "OIP").

The OIP alleges that 1) Respondents made "fraudulent misrepresentations to several customers of Charles Vista to induce them to invest in convertible debentures issued by a start-up waste management company called Waste2Engery Holdings, Inc. ("W2E")"; 2) during telephone conversations with several customers, Lorenzo "attempted to convince [the customers]" to purchase W2E debentures by "(a) making false, misleading, and unfounded statements" relating to the risk of the W2E debentures and positive predictions about the "upside" of the investment; and 3) Charles Vista "committed fraud through the actions of [] Lorenzo and Frank Lorenzo."[1] The OIP charges that as a result of the alleged conduct, Respondents willfully violated Section 17(a) of the Securities Act of 1933 (the "Securities Act"), Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") and Rule 10b-5 thereunder, and Charles Vista violated Section 15(c)(1) of the Exchange Act.

As set forth herein, the claims against Respondents fail because the offering documents "bespoke caution," and any reliance on oral statements were unreasonable as a matter of law. Respondents relied on experienced counsel in connection with the offering. In addition, the SEC will be unable to meet its burden of proof to establish that Respondents engaged in the alleged

[1] See, OIP, pp. 1-2.

wrongful conduct to support the alleged violations of the anti-fraud provisions of the securities laws as set forth in the OIP.

Argument

I. W2E Investment "Bespoke Caution," and Any Reliance on Alleged Oral Statements Is Unreasonable As A Matter of Law

A. The W2E Private Placement to Accredited Investors

W2E was a company incorporated in Delaware that raised funds through a private offering of securities pursuant to Regulation D, Rule 506 ("Rule 506"). Regulation D sets forth exemptions adopted by the SEC to the registration requirements of the Securities Act of 1933.[2] As set forth in the Private Placement Memorandum for a Private Offering of Senior Convertible Debentures dated September 9, 2009 (the "W2E PPM"), W2E intended to use part of the net proceeds from the offering to repay existing debt, and the balance to fund W2E's working capital requirements and monthly operating expenses. (W2E PPM, p. 17). The offering was provided only to "accredited investors" as such term is defined in Rule 501 of Regulation D. (W2E PPM, p. iv).

Rule 502(b)(2)(v) requires an issuer in a Rule 506 offering to provide potential investors with the "opportunity to ask questions and receive answers concerning the terms and conditions of the offering and to obtain any additional information which the issuer possesses or can acquire." 17 C.F.R. §230.502(b)(2)(v). Charles Vista facilitated W2E's obligation under Rule 502(b)(2). Several of the investors had conversations with W2E's management and were able to ask questions and receive information about W2E directly from the company in accordance with Rule 502(b)(2).

[2] 15 U.S.C. 77, et seq.

B. The "Bespeaks Caution" Doctrine

The "Bespeaks Caution" doctrine holds that alleged misrepresentations in an offering are immaterial as a matter of law when a reasonable investor would not consider such information important in view of adequate cautionary language disclosed in the same offering. Halperin v. Ebanker USA.Com, Inc., 295 F.3d 352, 357 (2d Cir. 2002). The Second Circuit in Halperin stated,

> The touchstone of the inquiry is not whether isolated statements within a document were true, but whether defendants' representations or omissions, considered together in context, would affect the total mix of information, and thereby mislead a reasonable investor regarding the nature of the securities offered.

Courts have consistently upheld the "bespeaks caution" doctrine. *See* Friedman v. Arizona World Nurseries L.P., 730 F. Supp. 521, 541 (S.D.N.Y. 1990) (warnings and disclaimers limit the degree to which investors may reasonably rely on an offering document as a forecast for future performance).[3] In Luce v. Edelstein, 802 F.2d 49 (2d Cir. 1986), the Second Circuit determined that where an offering memorandum warned prospective investors that "actual results may vary from the predictions and these variations may be material," liability would not be imposed on the basis that the statements bespeak caution. *Id.* at 56. "[I]n determining whether the statements are actionable, the court must scrutinize the nature of the statement to determine whether the statement was false when made. While analyzing the nature of the statement, the court must emphasize whether 'the prediction suggested reliability, *bespoke*

[3] The "bespeaks caution" doctrine has been recognized in SEC administrative proceedings. "The 'bespeaks caution' doctrine recognizes that the text of an offering document must be read in context. The doctrine is equally applicable to allegations of both affirmative misrepresentations and omissions of 'soft information.'" In the Matter of Public Finance Consultants, Inc., et al., Release No. 274, 2005 WL 464865, at 41 (February 2005)(Internal citation omitted).

caution, was made in good faith, *or* had a sound factual or historical basis.' " In re Donald J. Trump Casino Sec. Litig., 793 F. Supp. 543, 553 (D.N.J. 1992), *aff'd sub nom.* In re Donald J. Trump Casino Sec. Litig.-Taj Mahal Litig., 7 F.3d 357 (3d Cir. 1993). The Second Circuit declined to impose liability where the language in the prospectus "[when] read in context, is not materially misleading" and "the first sentence of the Prospectus Summary, which states that the summary 'is qualified in its entirety by reference to the more detailed information included elsewhere in the prospectus,' unambiguously communicates the importance of reading all relevant information contained within the prospectus." I. Meyer Pincus & Associates v. Oppenheimer & Co., 936 F.2d 759, 763 (2d Cir. 1991).

The "Bespeaks Caution" doctrine bars recovery for fraud claims when the documents adequately warn investors. "Dismissal of securities fraud claims may be appropriate where the offering documents specifically warn plaintiffs not to rely on the alleged misrepresentations made by defendants, thus making any subsequent reliance unjustified." Griffin v. McNiff, 744 F. Supp. 1237, 1253-54 (S.D.N.Y. 1990).

The W2E PPM contained an affirmative cautionary language alerting potential investors to the "highly speculative" nature of the securities offered by the W2E PPM. Such warnings include, but are not limited to the following:

- **THE SECURITES OFFERED HEREBY ARE HIGHLY SPECULATIVE, INVOLVE A HIGH DEGREE OF RISK AND SHOULD NOT BE PURCHASED BY ANYONE WHO CANNOT AFFORD THE LOSS OF THEIR ENTIRE INVESTMENT. PROSPECTIVE INVESTORS SHOULD CONSIDER CAREFULLY THE INFORMATION SET FORTH UNDER "RISK FACTORS" BEFORE PURCHASING SUCH SECURITIES.** (W2E PPM, p. iii) (Emphasis in original).

- IN MAKING AN INVESTMENT DECISION, INVESTORS MUST RELY ON THEIR OWN EXAMINATION OF THE

ISSUER AND THE TERMS OF THE OFFERING, INCLUDING THE MERITS AND RISKS INVOLVED. INVESTORS SHOULD BE AWARE THAT THEY MAY BE REQUIRED TO BEAR THE FINANCIAL RISKS OF THIS INVESTMENT FOR AN INDEFINITE PERIOD OF TIME. (W2E PPM, p. v) (Emphasis in original).

- *The Securities offered hereby involve a high degree of risk. You should not assume that the information contained in this Memorandum is correct on any date after the date of this Memorandum.* (W2E PPM, p. 5) (Emphasis in original).

In accordance with the W2E PPM, each investor was required to complete a Subscription Agreement in order to invest in W2E. The Subscription Agreement required the investor to affirmatively represent, among other things, the following:

- The Subscriber recognizes that the purchase of the Debentures involves a high degree of risk including, but not limited to, the following: (a) the Company has a limited operating history and requires substantial funds in addition to the proceeds of the Offering; (b) an investment in the Company is highly speculative, and only investors who can afford the loss of their entire investment should consider investing in the Company and the Debentures; (c) the Subscriber may not be able to liquidate its investments; (d) transferability of the Common Stock issuable upon conversion of the Debentures and exercise of the Warrants is extremely limited; (e) in the event of a disposition, the Subscriber could sustain the loss of its entire investment; and (f) the Company has not paid any dividends since its inception and does not anticipate paying any dividend. [] [T]he Subscriber represents that the Subscriber has carefully reviewed the section of the Memorandum captioned "Risk Factors." (Subscription Agreement, para. 1.2, p. 2).

- The Subscriber hereby acknowledges and represents that (a) the Subscriber has knowledge and experience in business and financial matters, prior investment experience, or the Subscriber has employed the services of a "purchaser representative" [] to read all the documents furnished or made available by the Company [] to evaluate the merits and risks of such an investment...(b) the Subscriber recognizes the highly speculative nature of this

> investment; and (c) the Subscriber is able to bear the economic risk that the Subscriber hereby assumes. (Subscription Agreement, para. 1.4, p. 2).

Where an investor receives a prospectus or other offering document which "bespeaks caution," as did Investors A, B and C here concerning their respective W2E investment, the law is clear that any reliance on alleged oral statements to the contrary is unreasonable as a matter of law.

In Kennedy v. Josephthal & Co. Inc., 814 F.2d 798, (1st Cir. 1987), the First Circuit Court of Appeals held that it was unreasonable as a matter of law for plaintiffs to have invested in a tax shelter based upon unduly optimistic statements by the broker that were contradicted by the written disclosures in the written offering memorandum which he had received in connection with the investment:

> The opportunity to discover the misleading nature of the statement could not have presented itself more readily than it did. For each oral representation that Sinclair made and upon which appellant claimed he relied, there was a direct refutation by the plain language of the offering memorandum. Both Sinclair's statement and the offering memorandum's assertions could not be true at the same time.

In Carr v. Cigna Securities, Inc., 95 F.3d 544, 547 (7th Cir. 1996), the Seventh Circuit reached the same result and summarized its logic aptly:

> The claims are barred by a very simple, very basic, very sensible principle of the law of fraud, both the law of securities fraud and the common law of fraud. If a literate, competent adult is given a document that in readable and comprehensible prose says X (X might be, "this is a risk investment"), our literate, competent adult cannot maintain an action for fraud against the issuer of the document. This principle is necessary to provide sellers of goods and services, including investments, with a safe harbor against groundless, or at least indeterminate, claims of fraud by their customers . . . (citations omitted).

The Tenth Circuit reached the same result in Zobrist v. Coal-X, Inc., 708 F.2d 1511, 1518 (10th Cir. 1982), where the Court found "no reason to reward investors" who "throw caution and prospectuses to the wind," and accordingly held that:

> . . . knowledge of information contained in a prospectus or an equivalent document authorized by statute or regulation, should be imputed to investors who fail to read such documents. We thus hold that [plaintiff] must be charged with constructive knowledge of the risk and warnings contained in the Private Placement Memorandum.

Accord. J. Geils Bank Employee Plan v. Smith Barney Shearson, Inc., 76 F.3d 1245 (1st Cir.) cert. denied, 117 S. Ct. 81 (1996); Brown v. E.F. Hutton Group, et al., 735 F. Supp. 1196, 1200 (S.D.N.Y. 1990). aff'd 991 F.2d 1020 (2d Cir. 1993); Davidson v. Wilson, 973 F.2d 1391 (8th Cir. 1992).

The W2E PPM contained specific cautionary language instructing the potential investor that he/she could only rely on the information and representations contained in the W2E PPM. The W2E PPM stated as follows:

- THIS MEMORANDUM CONTAINS ALL OF THE REPRESENTATIONS BY US CONCERNING THIS OFFERING AND NO PERSON IS AUTHORIZED TO MAKE DIFFERENT OR BROADER STATEMETNS THAN THOSE CONTAINED HEREIN. INVESTORS ARE CAUTIONED NOT TO RELY UPON ANY INFOMRAITON NOT EXPRESSLY SET FORTH IN THIS MEMORANDUM. (W2E PPM, p. v) (Emphasis in original).
- NO DEALER, SALESMAN OR OTHER PERSON HAS BEEN AUTHORIZED TO GIVE ANY INFORMATION OR TO MAKE ANY REPRESENTATION NOT CONTAINED IN THIS MEMORANDUM AND, IF GIVEN OR MADE, SUCH INFORMATION OR REPRESENTATION MUST NOT BE RELIED UPON AS HAVING BEEN AUTHORIZED BY US. (W2E PPM, p. v) (Emphasis in original).

Moreover, the Subscription Agreement required the investor to affirmatively represent, the following:

> - In making the decision to invest in the Debentures, the Subscriber has **relied solely upon the information provided by the Company in the Offering Materials. [] The Subscriber disclaims reliance on any statement made or information provided by any person or entity in the course of Subscriber's consideration of an investment in the Debentures other than the Offering Materials.** (Subscription Agreement, para. 1.6(a), p. 3) (Emphasis added).

In connection with each of their investments in W2E, Investors A, B and C voluntarily verified to Charles Vista, in written subscription documents(s) amd qualified purchaser questionnaire(s), their knowledge, experience, income, net worth, ability and willingness to risk their capital. Specifically, each of the investors received a copy of the W2E PPM and executed Subscription Agreements and Purchaser Questionnaires prior to investing in W2E. As a result, Investors A, B and C represented, at a minimum, that they were "accredited investors," understood that the W2E securities they were investing in were "highly speculative," had read and understood the "Risk Factors" section of the W2E PPM, made their decision to invest solely on the information in the offering material and disclaimed reliance on any statement or information given by anyone in the course of their consideration of the investment outside of the offering documents.

The SEC will likely present evidence of oral and written communications between Respondents and Investors A, B and/or C which purport to lure them to invest in W2E. As demonstrated by the case law, such extraneous representations are in direct contravention of the statements contained in the W2E PPM and representations by the investors in the Subscription Agreement and thus, are not "as a matter of law" grounds for finding fraud.

Moreover, evidence will be presented at the hearing that the investors spoke with management of W2E and, had an opportunity to ask questions and receive information about W2E directly from management. Such direct communication between the investors and the management of W2E is in accordance with the disclaimers and warning language contained in the W2E PPM and thus, further demonstrates that any allegations of fraud must fail because of the "bespeaks caution" doctrine.

II. Respondents Reasonably Relied on Counsel

Respondents reasonably relied on experienced counsel, Sichenzia Ross Friedman Ference LLP ("SRFF"), in connection with the preparation of the W2E PPM. In order to establish reliance on counsel a party must show that they made complete disclosure to counsel, sought advice as to the legality of the conduct and received advice that the conduct was legal and relied on that advice in good faith. Markowski v. S.E.C., 34 F.3d 99 (2d Cir. 1994); *see* S.E.C. v. Leffers, 289 F. App'x 449, 451 (2d Cir. 2008)

W2E hired experienced counsel, SRFF, to prepare the W2E PPM. W2E provided SRFF with information relating to W2E for the purpose of evaluating the disclosures necessary and preparing the W2E PPM in accordance with applicable securities laws. Respondents received a completed W2E PPM from SRFF which contained disclosures determined by SRFF to be material. Respondents relied on SRFF's legal experience and distributed the W2E PPM to investors. Based on counsel's advice and preparing of the W2E PPM, Respondents reasonably believed that the PPM disclosures were materially complete.

It is reasonable and routine for a small broker-dealer with limited resources to rely on experienced counsel for due diligence. Respondents did not adopt a complacent attitude. Respondents actively pursued the advice of counsel and participated in seeking information from W2E.

III. There is No Scienter

The SEC cannot prove that Lorenzo or Charles Vista engaged in conduct which violates Section 10(b) of the Exchange Act ("10b"), Rule 10b-5 ("10b-5") thereunder. As set forth in detail below, well established statutory and case law sets forth the elements that must be proven in order to establish liability for violations of these provisions most notably, intent – "scienter." The SEC will be unable to prove that Lorenzo or Charles Vista acted with the necessary scienter and therefore, these alleged violations must fail.

Section 10(b) of the Exchange Act of 1934 provides that it is forbidden to,

> "use or employ, in connection with the purchase or sale of any security ..., any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 78j(b).

SEC Rule 10b-5 implements § 10(b) by declaring it unlawful:

> (a) To employ any device, scheme, or artifice to defraud,
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made ... not misleading, or
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." 17 CFR § 240.10b-5.

To establish liability for violations of 10b and 10b-5 the following elements must proven by a preponderance of the evidence: "(1) a misrepresentation, or an omission (where there is a duty to speak), or other fraudulent device; (2) in the offer or sale, or in connection with the purchase or sale, of a security; (3) scienter on the part of a defendant; and (4) materiality, in the case of any misrepresentation or omission." Securities and Exchange Com'n v. Hasho 784 F. Supp. 1059, 1106 (S.D.N.Y.1992).

It is absolute that: "To establish liability under § 10(b) and Rule 10b-5, a [] plaintiff must prove that the defendant acted with scienter, 'a mental state embracing intent to deceive, manipulate, or defraud.'" Ernst & Ernst, 96 S. Ct. 1375, 1382 and n.12. To prove scienter, it must be established that the defendant acted "*with an intent to deceive*-not merely innocently or negligently." Merck & Co., Inc. v. Reynolds, 130 S. Ct. 1784, 1796 (2010). For Rule 10(b)(5) purposes, scienter includes recklessness. Breard v. Sachnoff & Weaver, Ltd., 941 F.2d 142, 144 (2d Cir. 1991). "A plaintiff may satisfy the requirement to plead scienter by alleging facts (1) showing that the defendants had both motive and opportunity to commit the fraud or (2) constituting strong circumstantial evidence of conscious misbehavior or recklessness." In re Tremont Securities Law, State Law and Insurance Litigation, 703 F. Supp. 2d 362, 370-371 (S.D.N.Y. 2010).

In evaluating proof of scienter based upon circumstantial evidence, where the plaintiff pleads a strong inference of scienter, the law is clear that the analysis to be performed by the trier of fact is one that evaluates all explanations for the alleged conduct.

> The inquiry is inherently comparative: How likely is it that one conclusion, as compared to others, follows from the underlying facts? To determine whether the plaintiff has alleged facts that give rise to the requisite "strong inference" of scienter, a court must consider plausible nonculpable explanation for the defendant's conduct, as well as inference favoring the plaintiff...[T]he inference of scienter must be more than merely "reasonable" or "permissible" – it must be cogent and compelling, thus strong in light of other explanations. Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 318, 127 S. Ct. 2499, 2507 (U.S. 2007)

Neither Lorenzo nor Charles Vista have acted with the requisite scienter and thus, Enforcement cannot prove by a preponderance of the evidence that Lorenzo or Charles Vista violated 10b and 10b-5. As set forth above, Lorenzo and Charles Vista reasonably relied on counsel in connection with the preparation of the W2E PPM and the disclosures set forth therein,

and reasonably believed that statements made to investors were true at the time such statements were made.

In evaluating the persuasiveness of the circumstantial evidence relating to scienter that will likely be presented at the hearing, the Tellabs comparative analysis must be applied. In the instant proceeding, the Administrative Law Judge must determine whether the SEC has alleged facts that "give rise to the requisite 'strong inference' of scienter." In making this determination, the Administrative Law Judge must consider the "plausible nonculpable explanation" of Lorenzo and Charles Vista's alleged misconduct. At the time of the W2E offering to investors and the alleged misleading statements made to investors, Lorenzo and Charles Vista reasonably believed that information provided to investors was accurate based upon guidance from counsel and information they received from W2E. The SEC's assertions that Lorenzo and Charles Vista knew the statements to customers were fraudulent and misleading fails to be "cogent and compelling" as required by Tellabs when viewed in light of the alternative explanation.

Based on the foregoing, the SEC will be unable to prove that Lorenzo and Charles Vista had the requisite scienter to establish liability for violations of 10b and 10b-5.

IV. The SEC Will Be Unable to Meet Its Burden of Proof

It is well established that the SEC's burden of proof in administrative proceedings is the "preponderance of the evidence" standard. *See* Steadman v. S.E.C., 450 U.S. 91 (1981)(Holding that the SEC properly used the preponderance of the evidence test in a proceeding concerning violations of antifraud provisions of the federal securities laws.); Herman & MacLean v. Huddleston, 459 U.S. 375, 390 (1983)(In an action to by the SEC to establish fraud under Section 17(a) of the Securities Act [], proof by a preponderance of the evidence suffices to establish liability.), S.E.C. v. Lorin, 877 F. Supp. 192, 194-195 (S.D.N.Y. 1995)(Holding that the SEC's standard of proof was preponderance of the evidence where the SEC alleged violations of

Section 15(c)(1) and 15(c)(2) of the Exchange Act, Section 17(a)(1) of the Exchange Act). "A preponderance of the evidence standard allows both parties to share the risk of error in roughly equal fashion." Herman, 495 U.S. at 390.

In meeting the preponderance of the evidence standard, the SEC must present evidence that is reliable and probative to proving that the alleged false statements were made in connection with material facts. "While the Exchange Act does not address itself specifically to the question of what degree of proof is required in an administrative proceeding, the Administrative Procedure Act ('APA'), which is applicable to proceedings under the Exchange Act, does. Section 7(c) of the APA provides that no rule or order shall be issued by an administrative agency except as supported by 'the reliable, probative, and substantial evidence.'" In the Matter of Norman Pollinsky, 43 S.E.C. 852, 1967 WL 86325, at 1 (August 1968), *citing* 5 U.S.C.A. §556(d). In meeting this burden, the SEC must still prove that "the statements were misleading as to a material fact. It is not enough that a statement is false or incomplete, if the misrepresented fact is otherwise insignificant." In the Matter of Russell Ponce, CPA, SEC Release No. 102, 1996 WL 700565, 13 (December 1996).

In the instant proceeding, the SEC will be unable to meet its burden to prove the allegations against Respondents. The SEC will be unable to present reliable evidence to demonstrate that the alleged false statements were misleading as to any material facts. The OIP contains excerpts of phone conversations with various customers as well as isolated emails to customers which purport to demonstrate the alleged false and misleading statements, particularly in light of the offering documents. However, these alleged communications and correspondence are pieces of conversations and snapshots in time of ongoing communications with customers.

Thus, these communications are not the totality of the communications with the customers and are therefore, not reliable evidence to establish liability for the alleged violations.

Further, recordings of purported phone conversations that Lorenzo had with the customers, as referenced in the OIP, are not reliable evidence for the SEC to rely upon to meet its burden of proof. There have been no representations as to the chain of custody of such recordings, how the customer made the recordings, or if the recordings have been edited by the customer. The significant issues relating to these recordings will be demonstrated through testimony at the hearing. As a result, the recordings will be deemed unreliable and non-probative of the issues in this proceeding. Without evidence of the alleged false and misleading statements, the SEC will not meet its burden of proof necessary to find liability.

Conclusion

For the above stated reasons, the OIP issued by the SEC should be dismissed and no liability should be imposed on Respondents.

Dated: August 12, 2013

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